MEMORANDUM

I. Issues

(1) Is H.B. 6 a "law providing for a tax levy" that is excepted from the right of referendum under Article II, Section 1d of the Ohio Constitution?

(2) If so, does the Ohio Secretary of State have a clear legal duty pursuant to R.C. 3501.39(A)(4) to reject the Referendum Petition on H.B. 6?

The answer to each of these questions is an emphatic "yes." As a strong opponent of H.B. 6 acknowledged:

> *"[The] charges [imposed by H.B. 6] are **de facto taxes** because the power of the state is used to extract payments from electricity users.... The Legislature is being asked to **tax** electricity users ...."*
>
> [Edward W. Hill, Ph.D., OSU Economics Professor, testifying in opposition to H.B. 6 (emphasis added)]

As such, the Ohio Constitution unambiguously precludes a referendum on H.B. 6, and the Secretary of State has a clear legal duty to reject the Referendum Petition.

II. Legal Analysis

A. Issue 1 – H.B. 6 is a "law providing for a tax levy" that precludes referendum under Article II, Section 1d of the Ohio Constitution.

> "*Laws providing for tax levies* ... shall go into immediate effect.... The laws mentioned in this section *shall not be subject to the referendum*."
>
> [Article II, Section 1d of the Ohio Constitution (emphasis added)]

In *State ex rel. Donahey v. Roose*, 90 Ohio St. 345 (1914), the Ohio Supreme Court followed Article II, Section 1d in granting a writ of mandamus compelling the county auditor to immediately place on the county tax duplicate a new state property tax. The writ was granted, eliminating a 90-day delay in the effective date of the legislation, because it was "a law providing for a tax levy, and, by the provisions of Section 1d of Article II of the Constitution is expressly exempted from the referendum provisions of Section 1c of Article II of the Constitution of Ohio." *Id.* at Syllabus ¶ 1.

Here, the plain language of H.B. 6 levies "charges" of $170 million annually on all retail electric customers in Ohio and requires those funds to be deposited into funds in the custody of the Treasurer of State:

> (A)(1) Beginning for all bills rendered on or after January 1, 2021, ... such electric distribution utility **shall collect from all of its retail electric customers in this state, each month, a charge or charges**, which, in the aggregate, are sufficient to produce the following revenue requirements:
>
> (a) **One hundred fifty million dollars annually** for total disbursements required under section 3706.55 ... from the nuclear generation fund;
>
> (b) **Twenty million dollars annually** for total disbursements required under section 3706.55 ... from the renewable generation fund....
>
> Sec. 3706.53. Subject to section 3706.61 of the Revised Code:
>
> (A) Eighty-eight and twenty-five hundredths per cent of the charges collected under section 3706.46 of the Revised Code **shall be deposited** to the credit of the nuclear generation fund....
>
> (B) Eleven and seventy-five hundredths per cent of the charges collected under section 3706.46 of the Revised Code **shall be deposited** to the credit of the renewable generation fund....
>
> [R.C. 3706.46 (emphasis added)]

In determining whether these statutory charges are actually a tax, both the United States Supreme Court and the Ohio Supreme Court hold that the focus must be on substance over form. In *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), the U.S. Supreme Court held that the penalty imposed on individuals under the Affordable Care Act ("ACA") for not having health insurance was a tax, irrespective of the fact that Congress labeled it a "penalty," not a "tax." *Id.* at 574. As the Court noted, the bottom line was that "[t]he exaction the Affordable Care Act imposes on those without health insurance **looks like a tax in many respects**." *Id.* at 563 (emphasis added). *Accord: Drees Co. v. Hamilton Twp.*, 132 Ohio St.3d 186, ¶ 15 (2012) ("[i]n order to determine

whether certain assessments are taxes, we must analyze 'the substance of the assessments and not merely their form'").

Under the three-factor test adopted by the Ohio Supreme Court, a law such as H.B. 6 that imposes an assessment is a "levy of a tax" where it is imposed: (1) by the legislature, (2) upon a broad class of parties, and (3) for a public purpose. *Id.* at ¶¶ 26-32, 40-41. Here, the charges levied under H.B. 6 are imposed by the legislature, upon a broad class of parties, and for a public purpose.

The Ohio Supreme Court, in *State ex rel. Keller v. Forney*, 108 Ohio St. 463 (1923), dealt with the precise issue of whether legislation imposed a tax levy barring it from referendum under Article II, Section 1d of the Ohio Constitution. H.B. 6 meets every one of the characteristics of a tax levy identified in *Forney*:

- H.B. 6 states the *public purpose* for the tax: "to facilitate and continue the development, production, and use of electricity from nuclear, coal, and renewable energy sources in this state." [H.B. 6, Introductory Paragraph]
- H.B. 6 *designates the persons from whom the tax is "collect[ed]"*: "all … retail electric customers in this state." [R.C. 3706.46(A)(1)]
- H.B. 6 *fixes the amount of the tax*: "One hundred fifty million dollars annually" plus "Twenty million dollars annually." [R.C. 3706.46(A)(1)]
- H.B. 6 states *when the tax is payable*: "Beginning … January 1, 2021." [R.C. 3706.46(A)(1)]
- H.B. 6 states the *collected moneys* are to be *deposited "in the custody of the treasurer of state.*" [R.C. 3706.49 and 3706.53]

Thus, the substance of H.B. 6 is that it is a tax levy under *Forney*. Irrespective of the form of language used, it imposes a tax levy as that term is used in Article II, Section 1d. Indeed, the opponents of H.B. 6 vigorously opposed its adoption for the very reason that it imposes a "tax" on all Ohio electric customers. In addition to Professor Hill quoted above, many other opponents of

H.B. 6 acknowledged it as a "tax" and attacked it for that reason. *See* attached list of opponent protests that H.B. 6 imposes a "tax."

B. Issue 2 – Inasmuch as H.B. 6 is not subject to referendum under the Ohio Constitution, the Secretary of State has a clear legal duty pursuant to R.C. 3501.39(A)(4) to reject the Referendum Petition on H.B. 6.

The Secretary of State is mandated to accept a referendum petition "**unless** … the petition violates … any other requirements established by law." R.C. 3501.39(A)(4). The Ohio Constitution, of course, is "our state's most fundamental law." *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St. 3d 386, ¶ 30 (2007).

In *State ex rel. Burech v. Belmont County Bd. of Elections*, 19 Ohio St.3d 154 (1985), the Supreme Court issued a writ of mandamus directing the members of the Belmont County Board of Elections to reject a referendum petition that failed to strictly comply with election laws. *Id.* at 156. The Court reasoned that "*respondents are under a clear legal duty to reject petitions which are not in compliance with law* and prohibit their placement on the ballot." *Id.* (emphasis added).

Here, the Referendum Petition on H.B. 6 contravenes the express language of the Ohio Constitution, the State's most fundamental law. Because H.B. 6 is a "law providing for a tax levy" that is expressly exempt from a referendum pursuant to the Ohio Constitution, the Secretary of State has a clear legal duty under R.C. 3501.39(A)(4) to reject the Referendum Petition. In other words, the Referendum Petition, as a matter of law, cannot be certified, circulated to electors for signature, accepted for filing, determined to be sufficient, or placed on the ballot. It would be inherently misleading to allow the Committee responsible for the Referendum Petition to circulate a statewide Referendum Petition that states, implies or otherwise suggests that H.B. 6 is subject to referendum when, in fact, that is not true.

III. Conclusion

H.B. 6 is a "law providing for a tax levy" under Article II, Section 1d of the Ohio Constitution and, thus, is exempt from a referendum. Accordingly, the Ohio Secretary of State has a clear legal duty, pursuant to R.C. 3501.39(A)(4), to reject the Referendum Petition on H.B. 6.

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823337

OPPONENTS ACKNOWLEDGING THAT H.B. 6 IMPOSES A "TAX"

- "In my assessment, these non-bypassable charges [imposed by H.B. 6] are ***de facto*** **taxes** because the power of the state is used to extract payments from electricity users.... The Legislature is being asked to tax electricity users ...." [Written Testimony of Edward W. Hill, Ph.D., Professor of Economic Development, John Glenn College of Public Affairs & City and Regional Planning, The Ohio State University, dated June 25, 2019, to Ohio Senate Energy and Public Utilities Committee (emphasis added)]

- "HB6 is a new **energy tax**...." [Sierra Club Press Release, dated May 23, 2019 (emphasis added)]

- "The bill announced today is nothing more than another **bailout tax** for failing nuclear plants paid for on the backs of hardworking Ohioans." [Ohio Environmental Council Action Fund quote, *The Columbus Dispatch*, "Ohio Nuclear Plant Bailout Plan Encourages Other Zero-Carbon Energy," dated April 12, 2019 (emphasis added)]

- "HB 6 creates **a new tax** paid by all Ohio utility customers...." [AARP website (emphasis added)]

- "HB 6 would be a **bailout tax** on every Ohioan...." [Ohio Citizen Action website, dated @ May 29, 2019 (emphasis added)]

- HB 6 "**taxes ratepayers**." [Rep. Ryan Smith Tweet, April 12, 2019 (emphasis added)]

- "FirstEnergy Solutions is looking at you to pay off its creditors by creating a **special tax** on your utility bill." [Ohioans Against Nuke Bailouts, YouTube video, dated April 29, 2019 (emphasis added)]

- "Ohio Senate and House concurred on HB 6 in a 51 – 38 vote today, which means **a new energy tax** on Ohio electric customers ...." [Windpower Engineering & Development, dated July 23, 2019 (emphasis added)]

- "[S]ome groups oppose House Bill 6 because they believe it will saddle all Ohioans with a new ... annual $200 Million nuclear **bailout tax**." [American Petroleum Institute's Public Poll, dated, June 18, 2019 (emphasis added)]